

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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DOCKET No. 75 - 1053

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee

vs.

ERNEST HARVEY, JUNIOR,

Appellant

On Appeal from the United States District Court
for the District of Vermont

APPELLANT'S APPENDIX B

Bennett E. Greene, Esquire
Attorney for the Defendant-Appellant,

Appointed

(GOVERNMENT'S OPENING STATEMENT)

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OPENING STATEMENT - Government, Gray

AFTERNOON SESSION

(Jury present)

1:45 p.m.

(JURY SWORN)

THE COURT: Mr. Gray, representing the United States, wish to make an opening statement?

MR. GRAY: May it please the Court, Mr. GREENE, and ladies and gentlemen of the jury, my name is Bill GRAY. You've met Mr. COOK, United States Attorney. I'm the Assistant United States Attorney, and together with Mr. COOK, it's our duty to present the Government's case in this very, very serious matter.

Now, the purpose of an opening statement is not to give you evidence but it's to give you some idea what the evidence will be so that as you hear the witnesses who testify, and as you look at exhibits that may be offered and received, you will understand them and understand how they fit in the framework of the proof in this case. It is not the function of an opening statement for any of the lawyers to tell you what the law is; I don't intend to do that, but I would like to tell you just enough about the charges in the case so that you will understand how the facts I'm going to outline to you fits those charges.

First, as the Court pointed out and I think it bears repetition, the indictment in this case

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1 names two persons, Mr. HARVEY who is on trial here, and
2 another person named Mr. DUNHAM. For legal reasons which
3 needn't concern you, Mr. DUNHAM is not here before you.
4 This is a case just against Mr. HARVEY. However, as you
5 will hear from the evidence, Mr. DUNHAM's name will come up
6 from time to time. In fact one of the crimes charged, in
7 fact two of the crimes charged, are what we call conspiracy
8 counts and they charge that Mr. HARVEY had an agreement, or
9 a conspiracy, to commit certain offenses, and that agreement
10 has to be with somebody else and, at least in part, it's the
11 Government's intention that that agreement was at least in
12 part with Mr. DUNHAM.
13

14 Now, let me take the first count in
15 this indictment and I'll describe it very briefly and I
16 won't go into the law. The first count in the indictment
17 charges a conspiracy or an agreement to burglarize Lavalley's
18 Lumber Yard in Newport, New Hampshire. I don't know how
19 many of you people are familiar with the geography, but
20 Newport, New Hampshire is on a line sort of with Ascutney,
21 Vermont, and a little bit to the east of Claremont, New
22 Hampshire, not too far from the Vermont border.
23

24 The first count charges that as part
25 of that conspiracy there was an agreement or an understand-
26 ing to violate certain Federal laws. One of the Federal
27

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1 laws that they agreed to violate in committing the burglary,
2 so the indictment charges, was that they agreed to transport
3 the proceeds of that burglary in interstate commerce and
4 that the proceeds of that burglary would be at least five
5 thousand dollars, because that's what makes it a Federal
6 crime.

7
8 The second part of that same conspiracy
9 was that they had agreed to use dynamite in an illegal way,
10 and I'll come to that a little bit further in my remarks.

11 Counts two, three, four and five, in all
12 of which Mr. HARVEY is named, charge various violations
13 relating to the dynamite law, the Federal Dynamite Law. In
14 summary, I won't go into detail, in summary Count two charges
15 that Mr. HARVEY, together with other persons, transported
16 dynamite in interstate commerce from Vermont to Newport,
17 New Hampshire, for destructive purposes, and the charge is,
18 and the evidence will show, that this was to blow up a safe
19 in Lavalley's Lumber Yard, where they intended to do the
20 burglary.
21

22 Count three, again, interstate transporta-
23 tion, at the time, by a person convicted of a felony; that
24 is to say, a crime punishable by more than one year, and
25 as Mr. GREENE told you when you were selected, the proof in
26 this case is expected to show that Mr. HARVEY was, or had been,
27

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1 convicted of a crime of that nature, and thus, in transporting
2 it in interstate commerce, having been so convicted, is a
3 Federal crime.

4 MR. GREENE: Excuse me, Your Honor, I
5 would dispute the, what the counsel stated to the jury. As
6 characterized by Mr. GRAY, I don't agree that I said that.

7 MR. GRAY: I will, I think I can take
8 care of that.

9 MR. GREENE: I agree I said something of
10 that nature, but not what he stated.

11 THE COURT: All right, we'll let Mr. GRAY
12 continue.

13 MR. GRAY: Ladies and gentlemen, as
14 often happens during a trial, lawyers get up and try to
15 give you their best recollection of what has happened, and
16 in no case, and I'm sure you understand, am I trying to
17 force my recollection on you. I think Mr. - a more careful
18 way to say it perhaps, would be to say that Mr. GREENE
19 mentioned something about a prior conviction of Mr. HARVEY.
20 In any event, if he didn't, I will, and we intend to prove
21 that Mr. HARVEY had been previously convicted of a crime;
22 and thus, the transportation of dynamite by a person so
23 convicted, is a Federal crime, as the Court will tell you in
24 its instructions to the jury,

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1 The fourth count also charges inter-
2 state transportation of stolen dynamite - excuse me, of
3 dynamite, this time knowing that the dynamite had been stolen
4 previously. I think you understand that.

5 Count five is another dynamite viola-
6 tion, and this is a statute or a count based upon a statute
7 which makes it a crime to carry dynamite during the commission
8 of a felony, and the felony in question is the conspiracy
9 to rob Lavalley's and to transport the proceeds of that
10 robbery in interstate commerce, as described in Count one,
11 which I've already been over. So I've gone through counts
12 one through five.
13

14 Now, there is another count in this
15 indictment, Count six, and I want to hold that off for a
16 moment before I tell you about that count and what the
17 Government's proof will be with respect to that count.
18

19 I think, as I indicated, the purpose
20 of this opening statement is just to give you an outline
21 of the proof. The proof, in fact, will come from witnesses
22 or exhibits or sometimes stipulations, and you're not to
23 consider what I say or what Mr. GREENE says or what anybody
24 says, other than the witnesses under oath, as evidence in
25 this case. It's only the testimony and so forth, which is
26 evidence.
27

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1 Now, with respect to the counts one
2 through five, which I have just described to you, the outline
3 of the proof is as follows: First, let me tell you a
4 little bit about the people involved. You will hear
5 evidence that Mr. HARVEY lives in the vicinity of Barre,
6 Vermont. You will hear evidence that Mr. DUNHAM lives in
7 Williamstown, which as you know, is a little to the south
8 of Barre down in Orange County, Vermont.
9

10 You will also hear evidence that a
11 fifteen year old boy, named Byron NUTBROWN also lived in
12 Barre with his mother, and that he was a friend of Mr. HARVEY's.
13

14 In summary, the proof of trial will
15 show that during July and August of 1973 - that's a little
16 bit over a year ago - Mr. HARVEY and Mr. DUNHAM and this
17 other fellow named Mr. KIBLIN, who lives in Newport,
18 New Hampshire, formed a plan to burglarize this lumber yard
19 I told you about, called Lavalley's Lumber Yard in Newport,
20 New Hampshire, Mr. KIBLIN's hometown.
21

22 The proof will show that there were a
23 number of conversations leading up to this plan, and the
24 attempt to do so, and that these conversations took place
25 between Mr. DUNHAM, Mr. HARVEY and Mr. KIBLIN, both in
26 person and by telephone. The proof will show that the
27 burglary at Lavalley's was basically George KIBLIN's idea

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1 because it was his hometown, he knew what the background
2 was, he knew what the circumstances were.

3 The proof will also show that the co-
4 conspirators hoped to get at least ten thousand dollars
5 from this burglary in a safe and they intended to split
6 it at least three ways, which is their, which is what they
7 had agreed upon and that under that, at least six thousand
8 dollars would be coming back to Vermont with Mr. HARVEY
9 and Mr. DUNHAM who resided here.

11 Now, with respect to the dynamite in
12 these counts, during one conversation occurring just before
13 the burglary, and by the way, the burglary was attempted on
14 August 3rd of 1973, George KIBLIN says to Mr. HARVEY, "You
15 know, there's a safe in there and you're going to need
16 some fire power to get into that safe." And Mr. HARVEY
17 tells him, "Don't worry, we'll bring all the fire power we
18 need." And the proof will show that by the words "fire power"
19 they meant dynamite and they were going to blow that safe.

21 On Thursday, August 2nd, the day before
22 the attempted burglary, George KIBLIN, who was in Newport,
23 New Hampshire, receives a telephone call from Mr. HARVEY,
24 and he says, "We'll be coming over tomorrow night and we're
25 bringing plenty of fire power." Please understand that
26 I'm giving you the substance of a conversation, not the
27

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1 details because it's just an outline of proof.

2 On Friday night, August 3rd, Mr. HARVEY,
3 Mr. DUNHAM, arrived in Newport to pick up Mr. KIBLIN and
4 Mr. KIBLIN's surprised they have with them this boy,
5 Byron NUTBROWN, fifteen years old; picked up Mr. KIBLIN
6 and they went to a large gravel pit not far from the lumber
7 yard, and at the gravel pit they set the final details of
8 the plan; took some tools and a burlap bag out of the
9 trunk of a car, and by the way, the car is Mr. HARVEY's car,
10 the car they came over in. It's a car which has a police
11 radio in it, with a scanner on it so you can pick up the
12 local broadcasts.
13

14 At that point, Mr. HARVEY produces some
15 dynamite; Mr. KIBLIN takes the dynamite, sticks it inside
16 his shirt pocket; Mr. HARVEY takes the caps because, as you
17 know, if you deal with dynamite at all, you don't want to
18 have the caps, the exploding device, and the dynamite
19 together.
20

21 Mr. HARVEY was dressed in a camouflage
22 suit, and essentially they set a plan which was as follows:
23 Mr. HARVEY, Mr. DUNHAM are to go into the lumber yard -
24 I'm sorry, Mr. HARVEY and Mr. KIBLIN are to go into the
25 lumber yard because Mr. KIBLIN, after all, is familiar
26 with it; Mr. DUNHAM is to drive the car, and the boy,
27

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1 Byron NUTBROWN, is to act as a lookout along the road.

2 After some more conversations, one of
3 which I will return to shortly, they started upon their
4 plan, they, DUNHAM lets the other two out at the lumber
5 yard and HARVEY and KIBLIN enter the lumber yard.

6 Now, before they entered the building,
7
8 Mr. HARVEY and Mr. KIBLIN attempted to cut a power line
9 that goes into the building, and in so doing, didn't know
10 it, they set off a silent alarm in the police station in
11 Newport, New Hampshire, and you will hear testimony from
12 Officers PATTEN and MYNCZYWOR that they were sent to the
13 scene once the silent alarm was triggered, and you will
14 hear testimony how Officer PATTEN entered the lumber yard
15 and saw Ernie HARVEY, Mr. HARVEY and Mr. KIBLIN up on a
16 ladder and how, when he identified himself, when he said,
17 "Halt", they came down the ladder and they ran. Now, you're
18 going to hear testimony how Mr. KIBLIN had some kind of a
19 collision and ended up backing into a truck and broke his
20 collarbone, and arrested there on the spot.

21
22 You will also hear testimony about how
23 Mr. HARVEY got away by going into a river which is at the
24 back of the lumber yard.

25
26 Now, at that point, and this is what
27 the proof will show, Byron NUTBROWN apparently aware of what

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1 had gone wrong, went into a home in the area near the
2 lumber yard and he made a telephone call to his mother
3 back in Barre, and in a sense said he was scared and had
4 this problem, and the person who is in the home overheard
5 the telephone conversation and called the police and the
6 police find Mr. NUTBROWN. I won't go into detail now as to
7 what Mr. NUTBROWN said to the police officers, but as a
8 result of these conversations, Mr. DUNHAM was located and
9 later arrested in the gravel pit while sitting there in
10 Mr. HARVEY's car, and as a result of that, then we have,
11 DUNHAM is arrested and KIBLIN was arrested, and as I
12 indicated, Mr. HARVEY gets away, but a few days later,
13 Mr. HARVEY is arrested in Vermont and returned to
14 New Hampshire.
15

16
17 Now, that, in essence, is the outline
18 of the Government's proof on counts one through five. As
19 I indicated, and should indicate again, the Government will
20 prove each and every element of those offenses.

21 Count six is a very different charge
22 of a very different nature. Count six charges that
23 HARVEY, Mr. HARVEY and Mr. DUNHAM and others, or at least
24 one other, and the proof will show that one of those
25 others is George KIBLIN, had an agreement again, or a
26 conspiracy, to deprive Byron NUTBROWN of his Constitutional-
27

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1 ly guaranteed Civil Rights. Now, Civil Rights the indictment
2 charges them with violating, was his right to give evidence
3 and to give testimony concerning possible violations of
4 Federal law which surrounded this attempted burglary, and
5 you heard me just describe what those possible Federal
6 violations are.

7
8 This count also charges that as a result
9 of this agreement between Mr. HARVEY, Mr. DUNHAM and to
10 some extent, Mr. KIBLIN, death resulted to Byron NUTBROWN,
11 III, the fifteen year old boy. Now, let me stress something;
12 this is not a murder case; murder is not generally a
13 federal crime, and Mr. HARVEY is not charged with murder
14 in this court room. He is charged with an agreement or a
15 conspiracy, to silence him, if you will, Mr. NUTBROWN, which
16 resulted in Mr. NUTBROWN's death.

17
18 Now, let me give you briefly an outline
19 of what the facts will prove with respect to this aspect
20 of the case. First, I want to go back to the night of
21 the burglary, the attempted burglary, August 3rd, and I
22 believe the proof will show goes into August 4th of 1973.
23 Remember that I told you that when Mr. - remember that I told
24 you that the proof will show that when Mr. HARVEY and
25 Mr. DUNHAM arrived in Newport and picked up Mr. KIBLIN, they
26 had this boy, Byron NUTBROWN with them.
27

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1 You will hear proof that Mr. KIBLIN
2 said, "What are you doing bringing that boy along here", or
3 words to that effect. And you will hear how Mr. KIBLIN
4 protested having the boy along, because Mr. KIBLIN said
5 he was afraid if anything ever happened and they got caught,
6 the boy might talk because he wouldn't know any better.
7
8 You will hear about a conversation that took place at an
9 A&W root beer store very near both the gravel pit and the
10 lumber yard in which this subject was discussed. And you
11 will hear testimony that Mr. HARVEY and Mr. KIBLIN were
12 sitting in the front seat talking about this, and at one
13 point in the conversation Mr. HARVEY turned around and
14 looked at the boy in the back seat and he said, "Buffer", and
15 that was the name he used to call him, "Buffer, do you
16 understand what we're talking about?" And the boy said
17 yes. "Do you understand that if you ever get caught and
18 you ever said anything, you know I'd kill you, don't you
19 Buffer?" And Buffer said yes.

21 That, in essence, is what the proof will
22 show. I'm not suggesting that those are the exact words;
23 you'll have to take the exact words from the witness.
24

25 The proof will also show that shortly
26 after the arrest on, I guess by this time it's the morning
27 of August 4th, and I'm talking about a day or two after that,

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1 all three persons that I have mentioned, were in the
2 Sullivan County Jail in Unity, New Hampshire, which is a
3 local jail nearby; by all three, I mean Mr. KIBLIN who
4 was arrested with a broken collarbone, Mr. DUNHAM who was
5 arrested in the gravel pit, and Mr. HARVEY who had been
6 returned from Vermont.

7
8 Now, shortly after their arrest, all
9 three were visited by some police officers. They were
10 visited by a State Police officer from Vermont, Sgt. WADE
11 and Detective WEST from the Barre City Police Department,
12 and another detective named Ray JACOBS from the Barre Town
13 Police Department.

14
15 Now, as a result of a conversation that
16 DUNHAM had with JACOBS, you will hear testimony that
17 DUNHAM thought that JACOBS was a Federal agent of some
18 sort, and DUNHAM thought JACOBS was there because of the
19 dynamite. You will also hear testimony that DUNHAM spoke
20 to the others, both to Mr. HARVEY and to Mr. KIBLIN, and
21 said, "Hey, that guy there is interested in the dynamite
22 and there are some potential Federal charges there." And
23 you will also hear testimony that this was of great concern
24 to the three persons who have been involved, allegedly
25 involved in this burglary.

26
27 Now, you will also hear testimony that

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1 about a week later, I believe it's on August 13th, as a
2 result of a court proceeding in New Hampshire, the case
3 against KIBLIN was continued but he was released on bail
4 shortly thereafter, and the case against Mr. DUNHAM and
5 Mr. HARVEY was dropped, at least at that point in time.
6

7 You will hear further testimony that
8 during the rest of August, there were further plans as to
9 what to do about the boy and without going into all of
10 it at this time, you will hear that at that at a date which
11 is either in very late August or early September, the
12 proof won't be precise on this point, Mr. KIBLIN was at
13 home in Newport, New Hampshire, and got a call from HARVEY
14 and from DUNHAM, who were over at a bar in Ascutney, and
15 they asked KIBLIN if he could come over to Ascutney. He
16 couldn't, KIBLIN couldn't get a ride, so somebody came and
17 picked him up; they went to Ascutney, Vermont, and after
18 some time spent there, Mr. HARVEY left in his car and went
19 back to Barre, and DUNHAM and KIBLIN were to follow shortly
20 thereafter, but they spent a little bit too much time there
21 and had a few too many drinks and got back to Barre that
22 night, but got back to Barre that night quite late, and
23 when they arrived - I shouldn't say to Barre, I should say
24 to Williamstown - at Mr. DUNHAM's home, they met Mr. HARVEY.
25 And Mr. HARVEY said, "You're too late because we were going
26
27

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1 to do it tonight." And you will hear from George KIBLIN
2 how Mr. HARVEY, in essence, indicated that he had this plan
3 to kill the boy to keep him from testifying about the
4 matters I have discussed with you, outlined for you.

5 You will hear how Mr. HARVEY was upset
6 because he had come back too late, but he told George
7 KIBLIN, "You stay there with DUNHAM in DUNHAM's house and
8 we'll get to it when we can." You will hear testimony how
9 Mr. HARVEY said to DUNHAM, "Take George KIBLIN out to the
10 house so he will see where it is he has to drive and what
11 he has to, what it is he has to do." And you will also
12 hear how that very next day, pursuant to HARVEY's instructions,
13 DUNHAM took KIBLIN to an abandoned house on the Chelsea-
14 Williamstown Road in the Town of Washington, Vermont.

15 And you will also hear how Mr. KIBLIN
16 stayed with Mr. DUNHAM for a period of time, approximately
17 a week or ten days, and then on Saturday, September 8,
18 there came a telephone call, and Mr. HARVEY calls, spoke to
19 Mr. DUNHAM, and as a result of that telephone call, DUNHAM
20 asked his wife to take DUNHAM and KIBLIN to this abandoned
21 house where they went. We're talking about September 8th
22 in the late afternoon or early evening.

23 You will also hear how after DUNHAM
24 and KIBLIN were there for a while, Mr. HARVEY shows up in
25

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1 his car, and he's got Byron NUTBROWN in the car. You will
2 hear how Byron NUTBROWN was pulled out of the car on the
3 driver's side, and you will hear how George KIBLIN is given
4 the keys by Ernie HARVEY and says, "Get the stuff out of the
5 trunk." And George KIBLIN takes some shovels and other
6 things out of the trunk.

7
8 At that point, you will hear how
9 George KIBLIN leaves and drives away for two hours as he
10 was instructed to do as his role in this. You will hear
11 how he comes back at an uncertain hour, but it's dark, and
12 he picks up Mr. HARVEY and Mr. DUNHAM. And the substance
13 of the conversation is that they've taken care of the
14 problem, they've taken care of the boy in a manner which
15 is submitted, you will find meant they killed him, by taking
16 care of him that way.

17
18 You will further hear how last Spring,
19 June 23rd I believe it was, searchers behind that abandoned
20 house, in Washington, Vermont, on the Williamstown-Chelsea
21 Road, discovered the body of a boy, and grave about five
22 feet deep, and you will further hear testimony about how
23 that body's been identified as the body of Byron NUTBROWN
24 with dental records.

25
26 You will further hear testimony that
27 the cause of death was probable asphyxia - that means

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1 suffocation. And you will also hear considerable testi-
2 mony submitted on what Byron NUTBROWN was in a position to
3 say about this case and about the Federal violations
4 associated with this case.

5 Now, it was indicated in the jury selection
6 process, Mr. COOK told you that much of the proof in this
7 case is coming from George KIBLIN. The Government does
8 not contend that George KIBLIN is any angel. He has a
9 considerable criminal record. He also has, will testify
10 here under an order granted by the Court, which means
11 that his testimony given here, can't be used against him
12 except to prosecute him for perjury, if he lies.

13 As you all know, all citizens of the
14 United States have a right, which you have and I have, not
15 to be compelled to give evidence against themselves. With
16 this immunity order which I'm telling you about, overcomes
17 that privilege against self-incrimination, and a witness
18 can be compelled to testify against his will if you remove
19 that privilege, and that's the status in which George KIBLIN
20 will come before you as a witness.

21 Now, I'm going to ask you to keep an
22 open mind throughout this case. I mean that with respect
23 to all the evidence, but I mean that particularly with
24 respect to the testimony of George KIBLIN. Don't make up

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1 your mind about him one way or the other until you hear all
2 the evidence in the case, until you see how it fits together.
3 Don't make up your mind about any issue in the case until
4 you hear the Judge charge you on the applicable law, both as
5 to what the crime is and how you are to judge witnesses
6 and judge the credibility.

7
8 Against that background, I submit that
9 at the end of the case, you will be able to see who's
10 telling the truth. If you keep an open mind as the
11 evidence in the case is coming in, if you listen carefully
12 to the Court's charge, you will guarantee to both the
13 Government and the defendant, each of, of a fair trial that
14 each side deserves, and all each side in this case wants
15 is a fair trial.

16
17 I do submit, however, that at the end
18 of this case, when you do go into your deliberations, you
19 will find the Government has proved its case against
20 Mr. HARVEY beyond any doubt whatsoever on each of the
21 charges.

22 Thank you for your attention.

23 THE COURT: Mr. GREENE, do you wish to
24 make an opening statement at this time?

25 MR. GREENE: Having put the Government
26 to its proof, Your Honor, we'll reserve.
27

